BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH BROWNING Claimant VS. **EASY CREDIT AUTO SALES** Respondent AND **FIRSTCOMP INSURANCE** Insurance Carrier	)	Docket No. 1,028,772

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 20, 2006, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered a compensable injury. The ALJ noted that Dr. Paul Stein was the authorized treating physician and ordered that his referrals were to be treated as authorized, including referrals to Drs. Moskowitz and Whitaker. The ALJ also ordered temporary total disability benefits paid at the appropriate rate commencing August 24, 2006, until claimant is released from treatment or returns to employment. The ALJ also ordered that the Wesley Medical Center bill was properly deemed unauthorized medical.

Respondent requests review of the ALJ's finding that claimant suffered a compensable injury and denies that claimant suffered an accidental injury arising out of and in the course of his employment. Respondent appeals the authorization of Dr. Stein as claimant's treating physician, as well as the authorization of referrals to Drs. Moskowitz and Whitaker and the order for temporary total disability benefits.

Respondent acknowledges that the ALJ's order is dated October 20, 2006, and its Notice of Appeal was not filed until November 13, 2006. However, respondent asserts that the ten days to file an appeal from an Order of an administrative law judge is from the receipt of the Order, not the issuance of the Order. Respondent states that it did not

receive a copy of the ALJ's October 20, 2006, Order until November 10, 2006, when it received a copy as an attachment to a K.S.A. 44-512a Demand for Compensation claimant sent on November 7, 2006.

Claimant contends that he satisfied his burden to establish a work-related injury and requests that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

The Board must first determine whether it has jurisdiction to review the ALJ's October 20, 2006, Order. Pursuant to statute, the effective date of an award is "the day following the date noted in the award."[1] Excluding Saturdays, Sundays, and legal holidays, parties have 10 days to request this Board to review an administrative law judge's order or award.[2]

Respondent's attorney contends he did not receive a copy of the October 20, 2006, Order from the ALJ. The Order indicates that a copy was mailed to both claimant's and respondent's attorneys. Nevertheless, it appears that neither claimant's nor respondent's attorney received a copy of the ALJ's Order by mail. Respondent's attorney learned of the Order on November 10, 2006, and faxed a request for Board review on that same date. Friday, November 10, was a legal holiday, and the Board's office was closed. The respondent's Notice of Appeal was stamped received by the Division of Workers Compensation on Monday, November 13, 2006. In order to rebut the presumption that the Order was mailed and received, respondent's counsel attached his affidavit to the Notice of Appeal, which states:

> 1. I am the attorney for the Respondent and Insurance Carrier in the above-referenced proceeding pending before Judge Klein in Wichita, Kansas.
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> 2. I attended the Preliminary Hearing on October 5, 2006, as well as depositions on October 6, 2006, and submitted a Brief on or about October 13, 2006, to Judge Klein for consideration.
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> 3. The next documentation I received on the file was a Brief from the attorney for the Claimant, dated October 30, 2006.

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[1] K.S.A. 44-525(a).

[2] K.S.A. 2005 Supp. 44-551(b)(1).

4. Then, on November 10, 2006, I received the Claimant's Demand for Compensation, a copy of which is attached, that was purportedly mailed November 7, 2006 (already outside the ten business days following the issuance of the Order), which indicates that the Order of October 20, 2006, was faxed to Claimant's attorney's office on or about October 31, 2006.

5. That I was not faxed or mailed a copy of this Order, and the only copy of the Order received was the one attached to the Claimant's Demand for Compensation.

6. Pursuant to the mandates of *Johnson v. Brooks Plumbing*, 135 P.3d 1203 (Kan. 2006), the time to file a timely application with the Appeals Board is ten days after receipt of the Order, not issuance of the Order.

7. That the Order was first received by the below-signed counsel on November 10, 2006. Said Notice of Appeal was filed simultaneously on the same day.

8. Counsel for Respondent and Insurance Carrier also spoke with counsel for Claimant on November 10, 2006, and he also indicated that he first received the October 20 Order on October 31, 2006, when it was faxed to him by the Division's office in Wichita, the day after he had filed his Brief. At the time he filed his Brief on October 30, he had no knowledge that an Order had already been issued. He further advises that the faxed copy of the Order, faxed October 31, 2006, is the only copy of the documentation he has ever received.

9. Likewise, counsel for Respondent and Insurance Carrier has never received any other copy, other than that attached to the Claimant's Demand for Compensation.

Respondent argues that the *Johnson*[3] and *Nguyen*[4] cases require the Board to treat his request for review as timely. The Board agrees. *Nguyen* indicates that due process requires notice be given the parties and that both mailing and receipt of the Order are required to constitute notice.

> IBP argues that the mere filing of the award by the ALJ is all that is required to commence the running of the time limit for filing an application for review. [Citation omitted.] IBP is correct where the filing of the award is accompanied by notice to the parties. **However, the filing of an award is not notice to the**

[3] *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 135 P.3d 1203 (2006).

[4] *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

> **parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice.**[5] (Emphasis added.)

Accordingly, receipt of an award is imperative. Respondent's attorney, who is an officer of the Court, represents that he did not receive the October 20, 2006, Order until obtaining a copy from claimant's counsel on November 10, 2006. The Board finds no reason to doubt respondent's attorney's contention. Consequently, the Board finds respondent did not receive the October 20, 2006, Order on a timely basis and, therefore, respondent did not receive notice as required by due process. The Board concludes the November 13, 2006, request for review was timely. Consequently, the Board has jurisdiction to review the October 20, 2006, Order.

A preliminary hearing was held before Judge Klein on October 5, 2006. At the outset of that hearing, counsel for claimant stated:

> [CLAIMANT'S ATTORNEY] On a procedural note, Your Honor, Mr. Ebberly [*sic*] contacted my office requesting a continuance of this hearing. I advised him since I have a court order for treatment and the benefits being designated by the authorized doctor aren't being provided, I was not inclined to postpone this hearing. I did advise him, however, that I would allow him to go ahead and take any depositions he wanted after this hearing which are scheduled for tomorrow. And he can submit those for your consideration. I'm allowing that rather than postpone the hearing. But, that being said, if he wants to take that evidence and submit it to the Court is fine. However, though, those shouldn't be admissible nor should they pertain to this hearing because, again, if the claimant–excuse me, if the respondent is attempting to terminate benefits, they have to do so based upon their motion and notice of intent to the Court which has never been filed. There is a court order in place that Dr. Stein is the treating doctor for all tests, authorizations, et cetera, as the standard order states. So any additional testimony on that point can be taken and turned in to the Court but can't be considered by this court until the proper motions are filed and we are brought back for a second preliminary.
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> THE COURT: Okay. Mr. Ebbert?
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> [RESPONDENT'S ATTORNEY] Your Honor, I apologize for not appearing the last time. We did not–notice was set up before we entered our appearance and there was miscommunications on that. I found out about this hearing about an hour or so after it took place. In light of that and because of the issues on compensability, which are correct, my office attempted to schedule the depositions. They were scheduled in late August for Friday–for tomorrow. They were scheduled a long time ago. I don't know what the scheduling issues were, I wasn't involved in that. But I wanted these as soon as possible and these were apparently the first date we could get for these depositions of taking the testimony of Mr. Tjaden,

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[5] *Id.* at 589.

> T-j-a-d-e-n, who is the supervisor of the employee who I was intending to offer as evidence in a case later on as I also I wanted to not [*sic*] have a chance to cross examine, depose the employee. The reason I found out about this hearing, somebody in my office scheduled it. I would not have allowed it scheduled because I wanted to get these depositions set before this hearing was ever or any application for preliminary hearing was ever even filed. These depositions were noticed up and sent out August 28 and I assume this was coordinated a long time ago. In a perfect world, my plan would have been to take the depositions and if we believed there was sufficient evidence to show the judge that the claim should not be compensable, we would offer that subject to the application. The case is before you today for ongoing benefits. If there is evidence which is open in the record that shows the claim is not compensable, the injury did not occur in the course and scope of employment, then I believe the Court is in proper position to deny the application for any additional benefits. We just want to get the facts on the table. We haven't been able to do that partially for errors which occurred back in June, but also we tried to do that now. It is scheduled for tomorrow, there's no undue hardship placed upon the employee. We will have the depositions transcribed forthwith immediately on a rush notice and I'll write a short submission letter to the Division on Monday as to what issues came up at the deposition. We have not had an opportunity to cross examine or depose the employee; and if I could have done these depositions two weeks ago we would be ready for a full hearing, I believe. Also, I am not clear as to–due to the number of intent letters that were sent out, some of those were sent after the application for preliminary hearing was filed. So I'm not sure exactly what issues we're here on today. If we're here on all of them there is no reason not to do them at one time, but I don't know whether procedurally it can be done by the Division.
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> . . . .
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> THE COURT: Well, he can deny temporary total benefits and other things based on his it did not occur out of the course and scope and he may–he could win on that one easily today by presenting defense of it is not compensable. But the other stuff is going to be a different story maybe. So let's just see where we go.[6]

Only the direct examination testimony of claimant was presented at that hearing. Respondent's counsel reserved his cross-examination of claimant until the deposition which was scheduled for the following day, along with the deposition of claimant's supervisor, Mr. Tjaden. The ALJ ruled that the record would be held open for this purpose. At the conclusion of the October 5, 2006, hearing, there was another colloquy between the court and counsel:

> [RESPONDENT'S ATTORNEY]: Your Honor, I'm going to reserve all examination not to take up the Court's time. I'm going to take his deposition

[6] P.H. Trans. (Oct. 5, 2006) at 6-12.

tomorrow. We'll do it all at one time and submit it to the Division. I do have one Exhibit 1 that I will offer. I will attach that to the deposition and I will provide Mr.--

[CLAIMANT'S ATTORNEY]: Why don't you just mark it as a Deposition Exhibit.

THE COURT: Okay. Anything else for the claimant today?

[CLAIMANT'S ATTORNEY]: If you can rule on the issues that you are prepared to rule on and reserve the rest, that might help my client move on with treatment while we await the rest of this.

[RESPONDENT'S ATTORNEY]: I don't think the hearing is completed, so I don't think there's any position for the Court to rule at this time.

[CLAIMANT'S ATTORNEY]: Except that the only additional information which you are purporting to offer, you don't have a hearing set for.

[RESPONDENT'S ATTORNEY]: I can offer it a [*sic*] preliminary hearing when you scheduled yours.

[CLAIMANT'S ATTORNEY]: Not without your own notice of intent to terminate benefits.

THE COURT: We're back here again.

[CLAIMANT'S ATTORNEY]: You said earlier, Judge, that the TTD is an issue he could reserve regarding compensability even at my own hearing. I don't know if I agree with you, but that's what you said and that is fine. But I think the issue of surgical consultation and the treatment issues can't be stopped without–because there is a court order for treatment. TTD, I will acknowledge, is a new issue. But treatment, there is a court order in place and it cannot be stopped without another court order based upon his motion to terminate benefits.

THE COURT: Well, but I have to let him present his evidence on the issue of temporary total and whether it should go on or not, and that means he gets to have his depositions and turn those in to me within some fast time.

[CLAIMANT'S ATTORNEY]: He does. But that's why I am saying if you could rule on the issues that are not subject to that–

THE COURT: Well, which is–I mean, I can issue another order that says Stein is the authorized treating physician and all his treatment, tests and referrals are to be honored, if that's what you like.

[CLAIMANT'S ATTORNEY]: Well, that order is simply not persuading them to do what they are supposed to do. And my notice of intent is requesting

authorization for the referral to the authorized surgical consult. The original order says Stein's referrals are authorized.

[RESPONDENT'S ATTORNEY]: But for the Division to address the issue whether he's entitled to TTD, address the issue whether he's got a compensable claim, that is all going to be one in the same. If he's got a compensable claim, that's going to come. There has been no 20-day demand letters. We're not under that situation in preliminary hearing from this. I think all the evidence needs to come in whether or not–

THE COURT: I think you are going to get it. But, you know, missing the first one kind of puts you in a pickle. I don't know what I'm going to do. I'll do something, though. But, anyway, how much time are you going to need to get this deposition stuff down? How many are you taking?

[RESPONDENT'S ATTORNEY]: Just two.

[CLAIMANT'S ATTORNEY]: Both tomorrow.

THE COURT: I assume this one will be long and Mr. Tjaden–

[RESPONDENT'S ATTORNEY]: Mr. Tjaden.

[CLAIMANT'S ATTORNEY]: They are just scheduled an hour and a half apart or something.

[RESPONDENT'S ATTORNEY]: I don't think it is going to take that long. And I will reference–I don't have the reference. I'll reference the relevant information and if for some reason we are persuaded we are incorrect on that theory, I'll advise the Court of that as well.

THE COURT: Okay.

[CLAIMANT'S ATTORNEY]: I would think by the time transcripts come in and we write position letters, we could get everything to you for a decision by end of next week.

[RESPONDENT'S ATTORNEY]: Hopefully.

THE COURT: Let's make it that way. You will know–okay, I'll be ready. End of next week I want all the submission and all the transcripts. If you want to submit them by E-mail or something I can probably–then give me the others later, I'm okay with that. I'm going to hold it all. It just doesn't make sense not to because even if I issued the thing it is not going to make any difference.

[CLAIMANT'S ATTORNEY] Like I say, procedurally, I don't think that they can terminate benefits without filing a motion to do so.

> THE COURT: I don't think they can either, but then we're back where you are still just relying on the previous order. And those–I'm not sure–it is one of those situations where I don't have much of a remedy, as much as I might like to have one, other than I guess I could authorize the surgical consult. But for something that I know that may not be compensable or I may know may not be compensable after next week, it just doesn't make sense. So I'm just going to do it all at once. So if there's nothing else, we are adjourned.[7]

The ALJ also entered a written Order on October 11, 2006, which provided: "The decision in this case is delayed until 10-13-06 for the parties to submit deposition testimony and argument."

On October 13, 2006, counsel for respondent sent a letter to Judge Klein that discussed the testimony and presented respondent's argument. That submission letter referenced both claimant's preliminary hearing and his deposition testimony, as well as the deposition testimony of Mr. Tjaden. That letter reiterated that the record included not only the transcript of the October 5, 2006, hearing but also the two evidentiary depositions of claimant and Mr. Tjaden.

> In follow up to the Preliminary Hearing that was partially held on October 5, 2006, in Wichita, Kansas, please consider this our submission letter on the issues for the Preliminary Hearing and your ruling on claimant's request for additional benefits. **In addition to the testimony of the employee that was taken at the time of the Preliminary Hearing, depositions were also taken of the employee and Michael Tjaden on October 6, 2006**. I believe those original transcripts have now been forwarded to you for your consideration. If, for some reason, that is incorrect, please advise.[8] (Emphasis added.)

However, the only deposition transcript that was filed with the court was that of Mr. Tjaden. The evidentiary deposition of claimant is neither contained within the Division's administrative file nor is there any record of it having been filed with the Division of Workers Compensation. The Worker Compensation Division's computer "action codes" show only that a single deposition transcript was received on October 12, 2006. The transcript of the evidentiary deposition of Mike Tjaden, which was taken on October 6, 2006, is filed stamped received on October 12, 2006.

K.S.A. 2005 Supp. 44-523(a) provides:

> The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be

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[7] *Id.* at 29-33.

[8] Submission letter from respondent filed October 16, 2006, at 1.

> heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 44-534a(2) provides in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, **except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues**. (Emphasis added.)

K.S.A. 44-554 provides:

> The director or the administrative law judge, whoever is conducting the hearing or other proceeding, or any party affected by the hearing or proceedings may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in district courts in this state.

The ALJ granted respondent's request to leave the record open until October 13, 2006, in order for respondent to take the evidentiary depositions of claimant and Mr. Tjaden. The respondent's submission letter of October 13, 2006, advised the ALJ that those had both been taken within the time allowed and were both part of the record for his consideration. Although the record he considered cannot be ascertained from the ALJ's Order, the ALJ apparently did not consider the claimant's October 6, 2006, deposition testimony because that deposition is not contained within the Judge's file and there is no record of it having been filed with the Division. Accordingly, the ALJ did not consider the entire record before issuing his Order on October 20, 2006.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated October 20, 2006, is reversed and remanded to the ALJ for a determination after his consideration of the entire record.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge